Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-701

ALEXANDER T. ARTHURS, M.D.,
PETITIONER,

v.

CHRIS O. STERN,
AS SHE IS EXECUTIVE SECRETARY OF THE BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE OF THE COMMONWEALTH OF MASSACHUSETTS,
AND
THE MEMBERS OF THE BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE,
AND
THE DIVISION OF HEARING OFFICERS OF SAID COMMONWEALTH,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Citations to Opinions Below.

The opinion of the United States District Court for the District of Massachusetts dated March 3, 1977 (Tauro, D.J.), is reported at 427 F. Supp. 425. The decision of the United States Court of Appeals for the First Circuit is reported at 560 F. 2d 477. Both opinions and judgments and the memorandum of the Court of Appeals on petition for rehearing are printed as appendices to this petition.

Jurisdiction.

On August 16, 1977, the United States Court of Appeals for the First Circuit (Coffin, J.) filed an opinion (App. 21a) reversing a judgment (App. 1a) of the United States District Court for the District of Massachusetts (Tauro, J.) determining that § 63 of c. 112 of the General Laws of the Commonwealth of Massachusetts (M.G.L. c. 112, § 63) is unconstitutional. On August 30, 1977, petitioner, as appellee in the Court of Appeals, filed a petition for rehearing. On September 23, 1977, the petition for rehearing was denied but substantial changes were made in the opinion (App. 30a). Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. § 1254(1).

Questions Presented.

1. Does a state statute that absolutely bars the continuance of a civil licensing proceeding where a continuance is sought because of the pendency of criminal proceedings arising out of the same charges violate the Due Process Clause of the Fourteenth Amendment?

2. Is it open to a United States court of appeals on appeal from a judgment of a district court declaring that a state statute is unconstitutional on its face to determine, without any basis in the record or the pleadings, that the statute is constitutional as applied?

Statutory Provisions.

The Fifth Amendment to the Constitution of the United States is found at page xlvi of volume I of the United States Code (1958 ed.):

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the Constitution of the United States is found at page xlvii of volume I of the United States Code (1958 ed.):

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section sixty-three of chapter one hundred twelve of the General Laws of the Commonwealth of Massachusetts is found at page 1388 of the tercentenary edition (1932) of the General Laws, volume I:

> "Said boards[1] shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendence of any charge before any of said boards act as a continuance or ground for delay in a criminal action."

Statement of the Case.

This action was filed in the United States District Court for the District of Massachusetts on December 9, 1976. Jurisdiction was invoked pursuant to Title 28 U.S.C. § 1331 and Title 42 U.S.C. § 1983. Petitioner is a licensed physician. Respondents are the members and the executive secretary of the Board of Registration and Discipline in Medicine of the Commonwealth of Massachusetts (the Board), and a hearing officer assigned to the Division of Hearing Officers of the Commonwealth. At the time the complaint was filed, the Board had commenced an adjudicatory disciplinary proceeding against petitioner. On January 20, 1977, the case came on for hearing on a preliminary injunction, but upon stipulation of the parties that there was no need for further hearing, it was agreed that the case could be heard on its merits completely. A judgment was entered enjoining respondents from denying a continuance on the basis of M.G.L. c. 112, § 63 (App. 1a), and an appeal was taken by respondents from that judgment.

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[1] See fn. 4, p. 9, *infra*.

The case was heard primarily on a stipulation that would tend to establish the following facts:

On October 1, 1976, petitioner received an order to show cause why his license should not be suspended or revoked for allegedly issuing a prescription for a controlled substance for other than a legitimate medical purpose (App. 1a-2a). Before a hearing examiner assigned to hear the administrative case against petitioner, petitioner filed, among other motions, a motion to continue the proceedings and a supporting affidavit. This affidavit, whose veracity was never seriously controverted at any time, established that petitioner believed that he was entitled to a continuance under the Due Process Clause of the Fourteenth Amendment until criminal charges arising out of the same conduct and pending against him in the Superior Court of the Commonwealth of Massachusetts had been disposed of.

With respect to petitioner's request for a continuance, the Board's executive secretary argued and the hearing officer ruled that petitioner could not have a continuance because of the provisions of M.G.L. c. 112, § 63 (App. 4a). To a suggestion that this statute was unconstitutional, the hearing officer replied, "There is a proper forum for that . . . [a]nd this is not that forum." When petitioner's counsel suggested that "a proceeding will be brought either in the United States District Court on in another court, to compel the postponement of this hearing for the grounds that have been urged," the hearing officer replied: "I anticipate that and I think that you know some other forum is the proper place."

The case was ultimately heard in the District Court solely on one question: whether M.G.L. c. 112, § 63 was unconstitutional on its face. The District Court held that it was (App. 19a). The court so declared in its judgment and enjoined respondents from relying upon the statute in determining whether to grant petitioner's request for a con-

tinuance. The court did not determine whether petitioner was entitled to a continuance (App. 20a), nor did it set forth the standards that should be applied in determining whether to grant a continuance.

Respondents appealed to the United States Court of Appeals for the First Circuit. While the appeal was pending, the hearing officer in charge of the case determined that petitioner's request for a continuance should be granted, and this fact was called to the attention of the Court of Appeals by an affidavit prior to oral argument. Also, while the appeal was pending, petitioner was tried in the Superior Court of the Commonwealth of Massachusetts on one set of criminal charges pending against him and was found not guilty by a jury (App. 23a). This fact was called to the attention of the Court of Appeals in an affidavit filed after oral argument.

On appeal, respondents, as appellants, devoted most of their brief and almost all of their oral argument to procedural issues.[2] On August 16, 1977, the Court of Appeals handed down a decision in an opinion by Chief Judge Coffin. In that opinion, the court ruled that M.G.L. c. 112, § 63 was not unconstitutional "at least on the facts of this case" (App. 28a, 32a). It reversed the judgment of the District Court and vacated the injunctions.

Petitioner filed a timely petition for rehearing. Of the four points upon which rehearing was sought, only two are germane to the present petition: One was that, contrary to statements made in the opinion of the court, petitioner had never argued "that the Fifth Amendment requires the

[2] They argued the absence of a case or controversy ripe for judicial intervention, error in enjoining ongoing state proceedings where petitioner (allegedly) could have received relief from a state forum, and the failure of the District Court to abstain. None of these arguments were made in the District Court, and the Court of Appeals declined to consider them on appeal (App. 23a).

[respondent] board to stay its proceedings until the criminal action ends" or that "the board was constitutionally required to stay its proceedings until the criminal proceedings are over" or that a party "with something to lose in a [disciplinary] proceeding may never be forced to make" the choice between the consequences of silence and the consequences of testifying. The other was that the Court of Appeals had no facts before it upon which it could determine whether "on the facts of this case" M.G.L. c. 112, § 63 was constitutional as applied.

On September 23, 1977, the Court of Appeals denied rehearing. But it made substantial changes on page 5 of its slip opinion in an effort to reflect petitioner's actual arguments and the District Court's actual ruling (App. 28a, 31a), which was that M.G.L. c. 112, § 63 was unconstitutional on its face and ought, therefore, not to have been the basis for denying petitioner's request for a continuance of disciplinary proceedings.

Reasons for Granting the Writ.

I. A Statute Requiring an Administrative Agency Not to Continue an Administrative Hearing Until Related Criminal Charges are Disposed of is Unconstitutional.

Section 63 of M.G.L. c. 112 forbids the continuance of civil disciplinary charges against certain licensees requesting such a continuance because related criminal charges are pending (App. 23a). Anomalous as it may be, we begin this argument by emphasizing what petitioner did *not* argue and what the District Court did *not* rule: that persons simultaneously facing criminal and civil charges arising out of the same conduct are automatically entitled to have the hearing on the civil charges deferred until the criminal

charges are disposed of. We assume, although we have found no case decided by this Court directly in point, that such a proposition would go down to defeat upon the principles expressed in *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976). In any event, such a rule has been frequently rejected by lower federal courts. See *Flint* v. *Mullen*, 499 F. 2d 100, 103 (1st Cir. 1974), cert. den. 419 U.S. 1026 (1974); *DeVita* v. *Sills*, 422 F. 2d 1172, 1178-1179 (3d Cir. 1970); *United States* v. *Sloan*, 388 F. Supp. 1062, 1064 (S.D. N.Y. 1975).

Nevertheless, this Court and several other courts that have faced the subject have recognized that when civil and criminal charges are pending against a person at the same time and the civil charges are heard before the criminal case is disposed of, the hearing of the civil case may give rise to serious problems under the Self-Incrimination Clause of the Fifth Amendment or under general concepts of Due Process. *United States* v. *Kordel*, 397 U.S. 1, 8-9 (1970). *Silver* v. *McCamey*, 221 F. 2d 873, 874-875 (D.C. Cir. 1955). *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F. 2d 1204, 1214 (8th Cir. 1973), cert. den. 414 U.S. 1162 (1974). *Iannelli* v. *Long*, 487 F. 2d 317, 318 (3d Cir. 1973), cert. den. 414 U.S. 1040 (1973). The recognition is eminently sensible.

If a person who is the subject of an administrative disciplinary proceeding exercises his Fifth Amendment right to silence, and, as would certainly not be the case here, the administrative agency draws no inference from that silence, the matter still will be decided without the testimony of the person who could probably shed the most light on the subject. Particularly when a physician is accused of writing prescriptions without a legitimate medical purpose, it is, given the generally confidential nature of the physician-patient relationship, only the physician who can explain

definitively (a) the diagnosis that he had made upon the basis of his examination and the history taken from the patient and (b) the reason for prescribing particular drugs or medicines. There are likely to be few cases where, without his own testimony, the physician can hope to prevail in such a proceeding.

Because the right to practice a profession is a property right under both the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts, *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959); *Shaw* v. *Hospital Authority of Cobb County*, 507 F. 2d 625, 628 (5th Cir. 1975); *Lawrence* v. *Board of Registration in Medicine*, 239 Mass. 424, 428, 132 N.E. 174, 176 (1921), the Due Process Clause, we submit, requires that, in the absence of some overriding reason affecting the public welfare, this right not be taken away in consequence of a hearing at which the most significant evidence is likely to be absent.[3] Although no statistical evidence seems to be available, we think it reasonable to assume that a significant number of physicians and other licensees,[4] perhaps even a sizable majority, will, like the taxi driver in *Silver* v. *McCamey*, *supra*, exercise their right of silence at the administrative hearing.

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[3] In the case at bar, petitioner specifically noted in his complaint that he would probably not testify at the disciplinary hearing if it took place prior to the hearing of the criminal charges.

[4] M.G.L. c. 112, § 63 applies not only to physicians but to persons licensed by all boards of registration of the Department of Civil Service and Registration of the Commonwealth. See M.G.L. c. 112, §§ 61-62. Such persons include dentists, pharmacists, optometrists, nurses, podiatrists, veterinarians, embalmers, electricians, accountants, architects, plumbers, barbers, hairdressers, engineers, land surveyors, opticians, real estate brokers, electrologists, television technicians, chiropractors, nursing home administrators, and psychologists among others. See M.G.L. c. 13, §§ 9, 10-79.

The result of refusing a continuance to petitioner and persons similarly situated is that cases of this type are likely to be decided almost entirely on the charging authority's evidence. They should not be. This Court recently held in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4 (1974), that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." Although M.G.L. c. 112, § 63, by requiring administrative hearings to go forward before related criminal proceedings are disposed of, does not foreclose the opportunity to controvert the evidence introduced by the charging authority, it makes rebuttal far less effective whether or not a negative inference is drawn from the licensee's silence. It places a high price upon the "opportunity tc offer a contrary presentation": waiver of the privilege against self-incrimination in advance of a criminal trial and pre-trial disclosure of criminal defenses.

But here the Court of Appeals determined that if the disciplinary charges went forward prior to the disposition of the criminal charges and petitioner did not testify at the disciplinary hearings, an adverse inference would be drawn from his silence, although the inference would not be sufficient to support the revocation or suspension of his license to practice medicine (App. 24a). Relying on *Baxter* v. *Palmigiano, supra*, and *United States* v. *Kordel, supra*, 11, the Court of Appeals ruled that the Commonwealth of Massachusetts may by statute require the disciplinary hearings to go forward prior to the criminal proceedings even though an adverse inference would be drawn from petitioner's silence at the administrative hearings (App. 26a-27a). The Court distinguished *Lefkowitz* v. *Cunningham*, 97 S. Ct. 2132, 2136-2137 (1977), and, presumably, other

cases relied upon by the District Court and petitioner[5] by noting that in those cases the state had threatened "penalties or automatic unfavorable judgments" (App. 23a). And it treated the only case that appears to be directly in point, *Silver* v. *McCamey, supra*, as having been effectively overruled by *United States* v. *Kordel, supra* (App. 25a).

We submit that *Baxter* and *Kordel* present a poor starting point for analysis of the issues in the case at bar. The problem with the opinion of the Court of Appeals seems to be that it started out upon a basic misapprehension of the issues and arguments by ruling, initially, that the Fifth and Fourteenth Amendments did not *require* continuances of civil proceedings until criminal proceedings are disposed of. Although, when the petition for rehearing pointed out that no such argument had ever been made by petitioner or ruled upon by the District Court, the court did indeed make cosmetic changes to the last page of its opinion, it may reasonably be concluded that the opinion remains rooted in its original premise that continuances are not constitutionally required. If that indeed were the issue, *Kordel* and *Baxter* would be far more apposite.

In *Kordel*, this Court ruled that criminal proceedings need not be dismissed simply because the defendant had previously answered interrogatories in civil proceedings growing out of the same charges. In *Baxter*, this Court found that when prison disciplinary proceedings were being conducted at a time when no criminal charges were pending against the prisoners, an adverse inference could be drawn against prisoners who remained silent. In *Kordel, supra*, 8-9, this Court explicitly noted that the defendant in

[5] *Garrity* v. *New Jersey*, 385 U.S. 493, 497-498, 500 (1967); *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of New York*, 392 U.S. 280, 284-285 (1968).

the civil proceeding might have applied for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure, "postponing civil discovery until termination of the criminal action." The problem in the instant case is that because of a statute of the Commonwealth no relief in the nature of a protective order is or was available to petitioner. *Baxter* is distinguishable both because at the time of the disciplinary hearings no criminal proceedings were pending against the witnesses and because no request for a continuance seems to have been made. Moreover, the exigencies of prison discipline are simply not comparable to the problems of maintaining standards of ethics and competence among physicians.[6] As this Court held in *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), and reiterated in *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976): "[D]ue process is flexible and calls for such procedural protection as the particular situation demands."

Garrity v. *New Jersey*, 385 U.S. 493 (1967), is, as the District Court ruled, more nearly in point (App. 6a-7a, 18a-19a). In that case (*id.*, 494-495), appellants were local police officers in New Jersey. The Attorney General of New Jersey, in conducting a broad investigation, warned appellants in his investigation upon questioning them that anything they said might be used against them, that they had the privilege of refusing to answer questions if disclosure would tend to incriminate them, but that such refusal would subject them to removal from office. They answered the questions, and their answers were subsequently used against them in criminal proceedings.

This Court reversed. In an opinion by Mr. Justice Douglas it stated at page 497: "The choice given petitioners

[6] A practical discussion of the administration of prisons and of the problems of prison discipline is found in *The New Yorker*, issues of October 24, 31, and November 7, 1977, Hoffman, "Annals of Crime, A Prison and a Prisoner." See *Jones* v. *North Carolina Prisoners' Assoc.*, U.S. (June, 1977).

was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Calling the choice given to appellants' a choice "between the rock and the whirlpool" (page 498), the Court ruled that for the State to force such a choice upon the appellants was unconstitutional (*id.*, 500). Although, as the District Court noted (App. 7a), the present case is distinguishable from *Garrity* in that the assertion of the privilege does not result automatically in the loss of petitioner's license to practice medicine, it does make that loss far more likely.

The analysis of the Court of Appeals in this case should have proceeded from *Garrity* and from those cases in which a statutory mandate made it impossible to weigh the constitutional rights of an individual against the rights of society. It will simply not do to say that the manner in which a state may proceed occasionally or even ordinarily is the manner in which it may proceed invariably when constitutional rights hang in the balance. Thus, a state is not required to grant a change of venue in a criminal case because the defendant claims that local prejudice will prevent a fair trial, but it may not enact a statute that bars more than one change of venue in criminal cases. *Groppi* v. *Wisconsin*, 400 U.S. 505, 511 (1971). A state may exclude the criminal defendant from the courtroom for good cause, but it may not exclude him without such cause. Compare *Faretta* v. *California*, 422 U.S. 806, 816 (1975) (*dictum*), with *Illinois* v. *Allen*, 397 U.S. 337, 342-343 (1970). A state is free to award custody of an illegitimate child to that parent who will best serve the welfare of the child but it is not free to presume that fathers of illegitimate children are unfit to have custody. *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972). As noted in *Stanley*, *supra*, 656-657:

"Procedure by presumption is always cheaper and easier than individualized determination."

Massachusetts may decide, on a particular set of facts, that the interest of the Commonwealth in prompt resolution of questions involving professional fitness to practice outweighs the interests of the individual licensee in preserving his license and still maintaining his Fifth Amendment privilege against self-incrimination.[7] But the Court of Appeals erred in ruling that the Commonwealth is free to so presume in each case instead of making the case-by-case determination ordered by the District Court.

Nor is petitioner's Fifth Amendment privilege against self-incrimination the only right that is undermined by M.G.L. c. 112, § 63. The effect of M.G.L. c. 112, § 63 is to force a defendant to choose between revealing his defenses in a criminal case in advance of trial and, as a practical matter, maintaining his right to practice his profession. No reciprocal discovery is granted. For this reason, the statute is violative of the Due Process Clause of the Fourteenth Amendment, even apart from considerations of self-incrimination. *Wardius* v. *Oregon*, 412 U.S. 470, 478-479 (1973). See *Silver* v. *McCamey, supra.*

M.G.L. c. 112, § 63 operates without regard to the particular circumstances of each case. There is a significant likelihood in some if not all cases that requiring a disciplinary proceeding to go forward before criminal charges are disposed of will force the licensee to choose whether to give

[7] The Court of Appeals referred to the interest of the Commonwealth in promptly disciplining errant physicians (App. 26a). Such interest may sometimes require that the hearing take place before criminal charges are disposed of. These are, however, as in *Lefkowitz* v. *Cunningham, supra*, alternatives available. In an appropriate case a continuance may be conditioned upon the physician's limiting or even ceasing his practice while the continuance remains in effect.

testimony that will later be used against him at his criminal trial and at the same time reveal his criminal defense or lose his right to practice. For these reasons the District Court correctly ruled that the statute is unconstitutional on its face, and the judgment of that court should be reinstated.

II. The Court of Appeals had No Power to Determine that the Statute was Constitutional "As Applied" When No Such Question was Raised or Decided by the District Court and the Record was Inadequate for Such a Decision.

Footnote 6 of the opinion of the Court of Appeals (App. 27a) stated:

> "The district court took the view that § 63 impermissibly restricted the board's discretion to grant a continuance. We have concluded that the constitution does not require a stay in this case; we need not ask whether § 63 can be constitutionally applied in all cases. The statute is constitutional as applied, and we see no reason to create a variant of 'overbreadth' analysis for cases of this sort."

In seeking rehearing, petitioner argued that the Court of Appeals could not have made the findings implied in that footnote as well as other findings contained in the question on the record before it. More than a month after issuing its original opinion, on September 23, 1977, the Court of Appeals made considerable changes in its opinion. Nevertheless, footnote 6 has not been deleted. Thus, there

remains a finding by the court that M.G.L. c. 112, § 63, is "constitutional as applied." Petitioner must and does take at face value the statement of the Court of Appeals that it found the state statute constitutional as applied and did not consider whether the statute was facially unconstitutional.

We assume that the parties in the District Court could have litigated a question whether § 63 was constitutional as applied to the facts of this particular case. Thus, respondents for their part could have litigated such questions as whether petitioner's continuing to practice medicine constituted a grave danger to the public health, whether witnesses whom the Commonwealth would need to use in the disciplinary proceedings were about to disappear, whether petitioner's prior disciplinary record made his continuing to practice medicine an affront to public justice, or whether the case that respondents intended to present against petitioner at the administrative hearing made his testimony unnecessary. Petitioner might have raised questions whether the administrative hearing was likely to generate unfavorable pre-trial publicity, whether his administrative case depended on defenses such as entrapment that he ought not to be compelled to reveal before the criminal case was heard, or whether the respondents were deliberately seeking to hold the hearing in advance of the criminal trial to try to force petitioner to reveal his defenses generally. This list is not exhaustive. The point is that none of these questions was raised in the District Court; neither petitioner nor respondents asked the District Court to rule on whether petitioner was entitled to a continuance and the District Court did not rule on this issue. Petitioner argued simply that he was entitled to have his motion for a continuance heard by respondents without regard to the provisions of M.G.L. c. 112, § 63, which was facially unconstitutional, and the District Court agreed.

The distinction between statutes that are facially unconstitutional and statutes that are unconstitutional as applied has long been recognized in decisions of this Court. See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 293-303 (1921) (dissent of Brandeis, J.). In *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479, 489-490 (1965); and *Berger* v. *New York*, 388 U.S. 41, 55 (1967), the statute under attack was held unconstitutional on its face. Although the notion of facial unconstitutionality is undoubtedly most often applied to statutes interfering with First Amendment rights, see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970), it has also been applied to statutes that prevent the litigation of issues of constitutional importance. Thus, in *Stanley* v. *Illinois*, *supra*, there was no showing that the particular unwed father actually would have been given custody but for the unconstitutional statute, nor, in *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972), was there any showing that, had the defaulting buyer been given a hearing before her property was repossessed on writ of replevin, repossession would have been denied.

It is easy enough to understand why statutes like M.G.L. c. 112, § 63 are often found facially unconstitutional. The right to a meaningful hearing on whether a disciplinary proceeding should be continued until criminal charges are disposed of, like the right of an unwed father to a hearing on custody of his child or the right of a buyer of goods on installment to a hearing before repossession, should be accorded to persons who will not prevail at such hearings as well as to those who will. The purpose of the hearing is to determine whether on the facts of a particular case a continuance should be granted, or custody should be awarded to the father, or the goods should be repossessed.

Saying that a hearing should be granted only to those who will prevail at such a hearing is like saying that a trial in a criminal case will be granted only to the not guilty. It begs the question.

The Court of Appeals had no basis for ruling that M.G.L. c. 112, § 63 was valid as applied. Had it first determined that the statute was facially constitutional, it might, we assume, have remanded the case to the District Court for a hearing on the issue of its validity as applied in this case. Or it might have simply reversed and left petitioner to litigate the question of the validity of the statute as applied to him at another time. *Cf. Swarb* v. *Lennox*, 405 U.S. 191, 201 (1972). When an appellate court decides a case against a party "without his ever having had the proper opportunity to present his evidence," that decision itself violates the Due Process Clause, even if the appellate court has reason to believe that at a hearing the party would lose on the merits. *Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917). Petitioner does not know how the Court of Appeals in this case determined that M.G.L. c. 112, § 63 was constitutional as applied to him. As already noted, an affidavit filed prior to oral argument pointed out that when the State hearing examiner ruled on the request for a continuance after the District Court's judgment forbidding him to rely on M.G.L. c. 112, § 63, he determined that the request should be granted. The record also showed that petitioner had been admitted to practice for over forty years and had never prior to this time been brought before the Board on disciplinary charges. Petitioner does not mean to suggest that on such a meager basis the Court of Appeals should or could have found M.G.L. c. 112, § 63 unconstitutional as applied to petitioner except, of course, as the statute is facially unconstitutional. Petitioner does submit, however, that the court ought to have stayed with the question before it — whether M.G.L. c. 112, § 63 was facially unconstitutional — and not attempted to decide a question of fact that had been neither raised nor litigated in the District Court.

Conclusion.

We realize that certiorari is not granted simply because the judgment of the lower court is erroneous. Nevertheless, we suggest that the two questions presented here, one bearing on the constitutionality of the statute that affects disciplinary proceedings not only against physicians but against numerous other licensees in the Commonwealth of Massachusetts, and the second, a serious question of the power of United States courts of appeals generally, are deserving of review by this Court.

We also call attention to the refusal of the Court of Appeals to follow a case in the United States Court of Appeals for the District of Columbia, *Silver* v. *McCamey*, *supra*, which has never been overruled.

For the reasons given, a writ of certiorari should issue to review and reverse or vacate the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALEXANDER T. ARTHURS

v. CA 76-4373-T

CHRIS O. STERN, ET AL.

Order.

February 1, 1977

TAURO, D.J.

On January 20, 1977 this court held a merged hearing on plaintiff's motion for preliminary injunction and on the merits. At that hearing, the defendants cited Mass. Gen. Laws ch. 112, § 63 in support of their position that proceedings before the Massachusetts Board of Registration and Discipline in Medicine may not be stayed pending resolution of related state criminal proceedings.

After hearing, it is hereby ORDERED that defendants are enjoined from relying upon Mass. Gen. Laws ch. 112, § 63 in denying plaintiff's request for a continuance of the Board's proceedings pending resolution of the criminal charges lodged against plaintiff in Middlesex Superior Court.

An opinion in support of this order will issue.

JOSEPH L. TAURO,
United States District Judge.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALEXANDER T. ARTHURS

v. CA 76-4373-T

CHRIS O. STERN, ET AL.

Opinion.

March 3, 1977

I.

TAURO, D.J.

The plaintiff, a duly licensed Massachusetts physician for forty years, was indicted on June 11, 1975, by a Middlesex County Grand Jury for allegedly prescribing controlled substances under circumstances that violated Mass. Gen. Laws ch. 94C, § 19(a).[1] These charges are still pending. On October 1, 1976, the defendant Massachusetts Board of Registration and Discipline in Medicine (Board)[2] commenced

[1]Mass. Gen. Laws ch. 94C, § 19(a) provides in pertinent part,

> A prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice. . .

[2]The other named defendants are Chris O. Stern (Stern), Executive Secretary of the Board and Nelson Baker (Hearing Officer), a state Hearing Officer who was assigned to preside over the proceedings.

disciplinary proceedings against the plaintiff[3] based on the same circumstances covered by the Middlesex County indictments.[4]

What triggered this law suit was plaintiff's unsuccessful plea to the Hearing Officer that the Board's proceedings be

[3]Mass. Gen. Laws ch. 112, § 5 authorizes such proceedings.

> The board shall investigate all complaints relating to the proper practice of medicine by any person holding a certificate of registration under sections two to twelve A, inclusive, or of section sixty-five so far as it relates to medicine and report the same to the proper prosecuting officers.
>
> The Board may, after a hearing pursuant to chapter thirty A, revoke, suspend, or cancel the certificate of registration, or reprimand, censure, or otherwise discipline a physician registered under said sections upon proof satisfactory to a majority of the board that said physician: . . .
>
> (b) is guilty of an offense against any provision of the laws of the commonwealth relating to the practice of medicine, or any rule or regulation adopted thereunder; . . .

[4]The Board's proceedings were commenced by an Order to Show Cause which stated that the Board had reason to believe that the plaintiff was "[i]ssuing a prescription for a controlled substance for other than a legitimate medical purpose, in violation of Gen. Laws ch. 94C, s.19 (a)."

As a result of formal and informal discovery procedures not otherwise relevant to this decision, plaintiff's counsel was given a copy of the indictment in response to his request for specification of the substance of the Board's charges. Subsequent to the filing of this action, plaintiff was also provided with the patient names, prescriptions and dates which underlie the asserted violations. These further specifications satisfied plaintiff's demands for further notice.

No suggestion has been made that the plaintiff is incompetent to practice medicine because of physical or mental infirmity or lack of ability.

The Board did not choose to use its authority under Rule 3.11 of the Board of Registration in Medicine Rules of Procedure to suspend summarily the license of a physician when it deems it in the public's interests to do so. A physician so suspended must be given the opportunity for a hearing within seven days thereafter.

continued until completion of the criminal proceedings, in order to protect fully plaintiff's rights against self-incrimination in the criminal case. The Hearing Officer denied the request for continuance. Mass. Gen. Laws ch. 112, § 63 prohibited him from exercising any discretion in the matter.[5] Plaintiff does not quarrel with the Hearing Officer's interpretation of § 63. Rather, by this action, brought under 42 U.S.C. § 1983,[6] he challenges the constitutionality of § 63, and seeks to enjoin its enforcement.

Plaintiff's argument to the Hearing Officer, as here, was that under Mass. Gen. Laws ch. 112, § 61 and Rule 4.16(a) of the Board's own Rules, Board proceedings are not governed by traditional rules of evidence; that in order to have any realistic chance of avoiding revocation of his license, the doctor would have to testify before the Hearing Officer; that the Hearing Officer and the Board would feel free to draw a negative inference against the plaintiff should he fail to so testify; that the possibility of such a negative inference being drawn has an unconstitutional coercive impact on plaintiff's Fifth Amendment right to remain silent in the criminal case; and that the challenged statute unconstitutionally deprives the Hearing Officer or the state court from exercising any discretion even to consider such a due process claim as a basis for a continuance.

On December 16, 1976, a temporary restraining order was entered by this court, without objection. After hearing and submission of an agreed statement of facts, the case was submitted on the merits.

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[5] § 63 provides,

> Said boards shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of said boards act as a continuance or ground for delay in a criminal action.

[6] The defendants concede that they are acting under color of state law within the meaning of 42 U.S.C. § 1983.

II.

A.

The essence of plaintiff's claim is that Mass. Gen. Laws ch. 112, § 63 imposes upon him an impermissible choice between constitutional rights — his right to protect his medical license, and his right to remain silent in the face of criminal charges. Plaintiff asserts, and defendants do not dispute, that he has a liberty and property interest in his medical license subject to due process protection. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Shaw v. Hospital Authority*, 507 F. 2d 625, 628 (5th Cir. 1975). He claims that the only way he can protect that interest from revocation by the Board is to testify in his own behalf at the Board's disciplinary proceeding. Plaintiff emphasizes that a refusal to testify would be perilous in light of defendants' position that the Board may draw a negative inference from his failure to do so.[7] But plaintiff points out that he is constrained not to testify before the Board, because he is also facing criminal charges arising from the same circumstances about which the Board seeks to inquire. He argues that his fundamental interest in avoiding any possibility of incriminating himself at the criminal trial dictates against prior testimony before the Hearing Officer.[8]

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[7] Defendants apparently derive their position from Rule 4.16(a) of the Board of Registration in Medicine Rules of Procedure which provides in pertinent part, "Unless otherwise provided by law, the Board need not observe rules of evidence observed by courts but shall observe the rules of privileges recognized by law."

This court does not have before it the question of whether defendants may properly draw such a negative inference. *See* Baxter v. Palmigiano, 96 S.Ct. 1551 (1976).

[8] Defendants do not dispute that testimony of the plaintiff before the Hearing Officer could be introduced against him in a later criminal trial.

Plaintiff contends that the mandatory provisions of § 63 require him to protect his right to practice medicine at the expense of sacrificing his right against self-incrimination in the face of criminal charges. Were it not for the mandatory feature of the challenged statute that denies the Hearing Officer and the state court the discretion even to consider his due process claims, plaintiff contends that he might not be put to this constitutionally impermissible choice. But for section 63, the Board could, in its discretion, postpone its proceedings so as to permit the plaintiff first to exercise his self-incrimination rights at trial, and then to protect his due process interests by testifying before the Board in defense of his medical license.

Plaintiff relates primarily upon two cases in support of his position that § 63 presents him with an unconstitutional choice: *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Silver v. McCamy*, 221 F.2d 873 (D.C. Cir. 1955).

In *Garrity*, the Supreme Court of New Jersey ordered the Attorney General to investigate police misconduct, giving him broad powers to carry out the assignment. Pursuant to that investigation, several policemen were questioned, after having been advised: 1. that there answers could be used against them at subsequent criminal proceedings, 2. that they had a constitutional privilege to refuse to answer on self-incrimination grounds, and 3. that refusing to answer questions would result in their automatic loss of employment under N.J. Rev. Stat. § 2A:81-17.1 (Supp. 1965). The defendants in *Garrity* were among those policemen questioned. They opted to answer the questions. The answers were used against them in subsequent criminal proceedings resulting in their conviction on conspiracy charges.

On appeal, the Court struck down the defendants' convictions on the grounds that they were the product of coerced statements. Coercion was found in the state's forcing policemen to choose between self-incrimination and job

forfeiture — a choice described as one putting them "between the rock and the whirlpool." 385 U.S. at 498. The Court framed its decision within an established line of authority forbidding states to condition the exercise of constitutional rights on the exaction of a price.[9] In *Garrity*, the right was avoidance of self-incrimination, and the price was loss of employment.[10]

While there are obvious similarities between *Garrity* and the instant case, several distinctions must be recognized. First, the consequence of asserting the self-incrimination privilege in *Garrity* was automatic loss of employment. Here, a negative inference from a failure to testify may be drawn by the Board, but loss of license is not a mandatory consequence of such failure. Second, the procedural setting of *Garrity* was an appeal from criminal convictions based in part on the testimony given by defendants during the civil investigation. It could be argued that *Garrity* only provides relief from the consequences of coercion, and does not serve as a precedent for the prevention of such consequences. For reasons set forth later, this court does not accept so restrictive an interpretation of *Garrity's* reach.

The plaintiff in *Silver v. McCamy*, 221 F.2d 873 (D.C. Cir. 1955) was a taxicab driver who had been indicted for two separate acts of rape. Prior to his second trial, he was charged by the Board of Revocation and Review of Hackers' Identification Licenses, on the basis of the same incidents, with being of improper character to operate a cab. That Board revoked his license prior to trial. He was subsequently acquitted of all criminal charges.

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[9] *Boyd v. United States*, 116 U.S. 616 (1886), is the seminal case in that line of authority.

[10] In reversing the convictions, the Court left unanswered the question of whether the statute which created the unconstitutional compulsion was itself unconstitutional. 385 U.S. at 496.

The plaintiff's suit to retain his license succeeded on due process grounds. In significant language, the Court of Appeals held,

> We agree with the District Court that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

Id. at 874-75. The court emphasized the fact that there were alternative means of protecting the public against an accused driver pending his criminal trial. First, the License Board could have revoked plaintiff's license on charges other than those which were the subject of the criminal proceedings. Second, that Board could have temporarily suspended plaintiff's license without causing a permanent loss of employment or a preview of plaintiff's defense.

Admittedly, there are distinctions between *Silver* and the instant case. First, *Silver* creates a remedy after a license is revoked. Like *Garrity*, it did not protect the plaintiff from having to make an unconstitutional choice, the relief sought by the plaintiff here. Its holding served only to provide relief from the consequence of such a choice. Second, *Silver* dealt with an ambiguous, though constitutional, statute that was determined to permit the delay of administrative proceedings pending completion of the criminal proceedings. There is no such ambiguity in the provisions of the statute challenged here. *Silver's* condemnation of a discretionary administrative hearing in advance of a criminal trial would appear to be persuasive authority with respect to the mandatory features of § 63.

Finally, the plaintiff argues that *Baxter v. Palmigiano*, 96 S. Ct. 1551 (1976), does not preclude his claim. In *Baxter*, the Court held that prison officials were allowed to draw an adverse inference from an inmate's invocation of the self-incrimination clause at prison disciplinary proceedings. *Baxter* is distinguishable from the instant case for a number of reasons. First, while a prisoner has the right to testify in his own defense at a prison disciplinary hearing, full due process safeguards do not attach to prison disciplinary situations. *Wolffe v. McDonnell*, 418 U.S. 539 (1974); *Lombardo v. Meachum*, No. 786-1265 (1st Cir. Jan. 20, 1977). Here, however, the Board hearing could adversely effect plaintiff's protected interest in his license to practice medicine, an interest fully protected by the Due Process Clause. Second, summary disciplinary proceedings were needed in Baxter to meet the exigencies of prison life. Here, no such exigencies appear on the record, and even if they did, a less drastic alternative by way of summary suspension was available to the Board.[11] Third, no criminal proceedings were pending in *Baxter* against the inmate, unlike the circumstances facing the plaintiff here.

B.

The defendants' argument boils down to a single proposition — that the Due Process Clause does not prohibit all adverse consequences that flow from invocation of the privilege against self-incrimination. As a general proposition of law, this court agrees. But as is true with most legal axioms, it is their application to a specific set of facts that dictates the merits of a particular case.

Defendants deny that § 63 forces the plaintiff to choose between his constitutional rights. They suggest that, at most,

[11] See note 4, *supra* and note 13, *infra*.

the statute forces plaintiff to make a tactical decision, whether or not to invoke his privilege against self-incrimination. They argue further that any adverse constitutional consequences that result from such a tactical choice may be challenged collaterally.

Of the authorities cited by defendants, the one most nearly analogous to the instant case is *United States v. Sloan*, 388 F. Supp. 1062 (S.D. N.Y. 1975). That case involved the federal prosecution of defendants who were also the subjects of a parallel investigation by the New York Stock Exchange. The defendants requested Judge Knapp to enjoin the Stock Exchange proceedings until the criminal trial, over which he was to preside, was completed. Their argument, like that of the plaintiff here, was that the scheduling of the administrative hearing prior to trial caused impermissible tensions between self-incrimination privileges and due process entitlements to a fair hearing.

In a memorandum opinion, Judge Knapp denied injunctive relief and rejected the contention that defendants' Fifth Amendment privilege was negated by an unconstitutional choice.

> This contention must be rejected. In *United States v. Kordel*, (1970) 397 U.S. 1, . . . the Supreme Court indicated that it was not unfair for a potential or actual defendant in a criminal case to be put to the choice of having to assert the privilege in a related civil matter. (citations omitted).

Id. at 1064.

While similarities between the instant case and *Sloan* are apparent, several significant distinctions dilute its impact as a potential persuasive precedent. Unlike the plaintiff here, the defendants in *Sloan* were not confronted by an administrative

body threatening to draw a negative inference from their silence. Judge Knapp explicitly stated that,

> . . . it is by no means certain that the Exchange will expel the defendants — or indeed take any disciplinary action against them — if they refuse to answer. The pendency of this criminal proceeding will have to be considered by the Exchange in determining the reasonableness of the defendant's actions.

Id. at 1064.

Second, neither Judge Knapp nor the New York Stock Exchange were precluded by legislative enactment from exercising their discretion as to the scheduling of the criminal case in relation to the administrative hearing. Indeed, Judge Knapp's opinion reflects an exercise of his discretion. Here, however, § 63 explicitly precludes the exercise of such discretion, despite the general recognition that situations may arise where civil proceedings should be deferred until disposition of a related criminal matter. *United States v. Kordel*, 397 U.S. 1, 9 (1970); *DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970).

Furthermore, the cited cases upon which *Sloan* and the instant defendants rely are distinguishable from the circumstances involved in this case. For instance, both the defendants and Judge Knapp cite *DeVita v. Sills*, 422 F. 2d 1172 (3rd Cir. 1970). In *DeVita* the New Jersey Supreme Court ordered a state court judge to serve as a Master to investigate corruption charges lodged against another state judge, with the possible result of the latter's disbarment and removal from office. Subsequent to the court's order, a two count state indictment was returned, based on the same alleged misconduct. Thereafter, the judge under investigation sought a preliminary injunction prohibiting the civil pro-

ceeding from going forward until the criminal case was completed, arguing potential infringement of his Fifth and Sixth Amendment rights. The Third Circuit affirmed the lower court's denial of injunctive relief, but its opinion clearly reflects a number of fundamental factors distinguishing its holding from the instant case.

First, the hearing sought to be enjoined in *DeVita* was a judicial proceeding that was to be presided over by a state judge, appointed by the New Jersey Supreme Court. The Third Circuit's concern with issues of jurisdiction and abstention with respect to enjoining a state court hearing underscores the judicial nature of the challenged proceeding. The instant case, however, involves a contemporaneous administrative hearing, not subject to the traditional rules of evidence[12] or constitutional restraints. Second, the hearing in *DeVita* was to be held *in camera*. The presiding judge had no power to resolve the issues or take definitive action. His authority was limited to making findings and recommendations to the New Jersey Supreme Court. Third, by order of the New Jersey Supreme Court, any testimony given by the investigated judge at the hearing could not be used against him at a subsequent criminal trial. Thus testimony at the pre-trial hearing could not prejudice his criminal defense. The two proceedings were effectively insulated from one another. These distinctions were recognized implicitly and explicitly by the Third Circuit in its analysis of *DeVita's* underlying circumstances.

> There is nothing in these rules or in the court's order which would compel the plaintiff's testimony. *There is nothing in the rules or the court order from which we can conclude that the plaintiff's failure to testify will be held a ground for disbarment or forfeiture of office.* (emphasis added).

[12] See note 7, *supra*.

Id. at 1177.

In *DeVita*, therefore, plaintiff had the choice of either asserting his privilege with impunity, or testifying with immunity. Neither option is available to the plaintiff here.

Third, *DeVita* like *Sloan*, involved a situation where the authorities had discretion to schedule the civil proceeding after the criminal. The New Jersey Supreme Court was free to schedule the Master's hearing at any time. Similarly, after that court received the Master's recommendations, it had discretion as to when the ultimate questions of disbarment and job forfeiture would be decided. There was no requirement that the court make a ruling prior to the criminal case.[13]

The *DeVita* court recognized that "Undoubtedly there are cases in which a court in the exercise of its discretion should stay discovery in a civil action pending the disposition of a criminal case." 422 F.2d at 1181. This same wisdom would apply to an administrative hearing. It is the statutory preclusion of such discretion by either the Board or the state court that is challenged by the plaintiff. In *DeVita*, the court determined that, given the safeguards built into the challenged civil proceedings, the investigated judge was merely faced with a difficult choice, not a constitutional dilemma.

[13] The New Jersey Supreme Court did suspend the judge in question from office and the bar during the pendency of the investigation. Such a temporary suspension worked an effective compromise between the public's interest and the interests of the plaintiff. A similar approach was available to the Board in the instant case under Rule 3.11 of the Board of Registration in Medicine Rules of Procedure. That rule allows temporary suspension of a doctor's license where necessitated by the "healthy, safety or welfare of the public." Invocation of that rule would require the Board to afford the plaintiff a hearing within seven days. Implicit in such a requirement, however, is that the plaintiff could avoid such a hearing, and assume the attendant consequences. The choice would be his. Here, however, he is being forced to undergo an administrative hearing against his will.

The defendants' position that the plaintiff's continued practice as a physician presents a public hazard must be weighed against the fact that it did not invoke its aforementioned summary powers.

Another case relied upon by the defendants and Judge Knapp, *United States v. Kordel*, 397 U.S. 1 (1970), is clearly distinguishable from the situation before this court. That case involved nearly contemporaneous civil condemnation and criminal proceedings arising out of the same alleged violations of the Food, Drug and Cosmetic Act[14] by a corporation and two of its officers. When interrogatories were put to the corporate defendant in the civil case, it moved for a stay or, in the alternative, for an extension of time in which to answer the interrogatories. After the district court denied the motions the corporation answered the interrogatories. Defendants were ultimately convicted of the criminal charges. On appeal, the Sixth Circuit reversed the convictions of the individual defendants on the basis that the use of interrogatories from a civil proceeding, to obtain evidence in a contemporaneous criminal proceeding, violated the self-incrimination privilege.

After granting certiorari, the Supreme Court reinstated the convictions, finding no violation of Fifth Amendment guarantees. The circumstances of *Kordel* distinguish it from the instant case. The Court stated that defendants could not raise Fifth Amendment objections to their convictions because the answers to interrogatories, upon which such objections were based, had been given voluntarily in the civil condemnation case.

Particularly relevant to this case is the *Kordel* Court's approval of the lower court's statement that,

> the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either given the evidence or suffering a forfeiture of his property.

397 U.S. at 13.

Accepting that proposition of law, it follows that one should be able to avoid such coercion by appealing to a court of equity. It simply does not make sense to require one to suffer the coercion and/or the forfeiture of property in order to invoke the protection of the court. Injunctive as well as remedial relief should be available to one caught "between the rock and the whirlpool." *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967). The challenged statute precludes such an opportunity.

Moreover, the civil proceeding scrutinized in *Kordel* was before a court, bound to recognize the privilege against self-incrimination and forbidden to draw adverse inferences from its exercise. Here, plaintiff is confronted with an administrative hearing before a Board not subject to judicial constraints, and which claims the power to draw a negative inference from the exercise of the privilege against self-incrimination.

Kordel actually stands for the proposition that the Constitution does not bar civil cases from being processed merely because a criminal indictment from the same facts may be forthcoming or pending. Plaintiff's position is more refined, however, and is well within the boundaries of dictum in *Kordel*.

> The respondents press upon us the situation where no one can answer the interrogatories addressed to the corporation without subjecting himself to a 'real and appreciable' risk of self-incrimination. *For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action.* (emphasis supplied).

Id. at 8-9. The thrust of plaintiff's case is that § 63 would preclude even the possibility of such an "appropriate remedy" being granted by either the Board or the state court.

Another case relied on by defendants is *Flint v. Mullen*, 499 F.2d 100 (1st Cir.) *cert. denied*, 419 U.S. 1026 (1974). In that case, the petitioner was indicted for robbing a bank while on probation. As a result of these charges, the government scheduled a probation violation hearing prior to his criminal trial. Petitioner unsuccessfully sought to postpone the hearing until completion of the criminal proceedings on the grounds that a prior hearing would force him to incriminate himself and to reveal his criminal defenses before trial. For that reason, he opted not to testify in his own behalf at the hearing and, consequently, he was incarcerated for violating his probation.

The First Circuit denied a habeas corpus attack on that incarceration. While conceding that it would be "preferable" to hold the probation hearing after the criminal trial, the court concluded that petitioner was not presented with an unconstitutional dilemma.

> The choice of whether or not to exercise one's Fifth Amendment right to remain silent must often be made in a setting where there is a concomitant due process right to be heard. Petitioner's decision was, in effect, the same choice he or any other defendant must make when brought to trial.

Id. at 103. Relying upon *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *rev'd*, 96 S.Ct. 1551 (1976), the court observed that petitioner's position would be more tenable if an adverse finding were to be his silence.

> Here, however, the government had to prove its case by extrinsic evidence and there is no indication that defendant was penalized for silence except to the degree that anyone who claims the privilege may be said to forego the possibility of persuading a court in his favor.
>
> . . . . . .
>
> We would view the choice as less strategic were an adverse finding to be based on the fact of defendant's silence, rather than independent evidence, as here.

Id. at 103.

As the only First Circuit case urged upon this court, *Flint* is particularly deserving of close analysis, even though it preceded the Supreme Court's opinion in *Palmigiano*. First, *Flint* involved a probation hearing before the Superior Court — a judicial proceeding — as opposed to the administrative hearing plaintiff seeks to avoid here. In such a judicial proceeding, no adverse consequences would attach to petitioner's exercise of his self-incrimination privilege. Here, however, such consequences are threatened.

Second, the interest at stake in *Flint* was revocation of a deferred sentencing program, as contrasted with revocation of a license to practice medicine threatened in the instant case. While some due process safeguards do attach to probation revocation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a party's liberty and property interests in probation are more tenuous than are the corresponding interests in a license to practice a profession. Due process rights and standards in the two situations are not comparable.

Third, the *Flint* court had to deal with the exigencies of getting a convicted felon, accused of a second felony, off the streets. There was no alternative procedure available for temporarily protecting the public's interest until the criminal charges were tried. The Board here had such a temporary option available, Rule 3.11.

Finally, in *Flint*, the court emphasized that,

> [t]he suggestion in the dissent that Rhode Island may have used the violation proceeding to gather evidence is totally inapplicable to any of the present facts; . . .

Id. at 104. Here, absent an emergency situation endangering the safety and well being of the public, it is difficult to conceive of any justifiable rationale for the § 63 requirement precluding the Board or a court from exercising scheduling discretion. No theory of emergency, incapable of being met by the Board's regulations, has been proffered in this case. As a practical matter, therefore, the challenged statute serves only as a vehicle for criminal pre-trial discovery, an impermissible practice. *Gardner v. Broderick*, 392 U.S. 273 (1968); *Flint v. Mullen*, *supra*.

Conclusion.

Three threshold premises are undisputed by parties. First, the defendants seek to act under color of state law within the meaning of 42 U.S.C. § 1983. Second, the plaintiff has a privilege against self-incrimination, available at both the criminal trial and before the Board. Third, plaintiff's medical license constitutes a liberty and property interest protected by the Due Process Clause.

There is no clear precedent with respect to the fundamental issue in this case, the constitutionality of § 63. The plaintiff here, however, falls somewhere within the protections afforded by *Garrity* and *Silver*. Given the teaching of these

cases, and the distinguishable features of the cases relied on by defendants, this court concludes that § 63 does impermissibly force the plaintiff to choose between his privilege against self-incrimination and his right under the Due Process Clause to testify in defense of his liberty and property interest in practicing medicine. It is, therefore, unconstitutional.

The plaintiff here is exposed to a threatened negative inference if he pleads his privilege against self-incrimination before the Board. Such a foreseeable consequence runs contrary to the established proposition that one may not be coerced into choosing between self-incrimination and the loss of an interest protected by due process rights. *Garrity v. New Jersey*, 385 U.S. 493 (1969); *Boyd v. United States*, 116 U.S. 616 (1886).

Admittedly, the consequences of this plaintiff asserting his right against self-incrimination are neither so clear nor severe as they were in *Garrity* — in that there is no automatic revocation. But it is sophistry to argue that the negative inference with which plaintiff is threatened serves to do anything less than to chill his privilege against self-incrimination. It is this negative inference that makes the instant case more analogous to *Garrity* than to cases relied on by the defendnats and Judge Knapp in *Sloan*: *DeVita*, *Kordel*, *Flint* and *McGautha* v. *California*,[15] 402 U.S. 183 (1971). The latter cases involved challenged judicial proceedings that paralleled related criminal trials. In those cases priorities as to scheduling were a matter of discretion. This case involves a challenged administrative hearing which by statute may not be stayed

[15] *McGautha* was an unsuccessful challenge to California's system of having the same jury decide guilt and punishment in capital cases. Again, the distinguishing feature of that case is that the challenged procedure was judicial not administrative, and was subject, therefore, to traditional constitutional and procedural safeguards.

pending the conclusion of a related criminal case. Where the contemporaneous civil proceedings are judicial, no adverse consequences may attach to invoking Fifth Amendment rights. Here, the contrary is threatened, and the mandatory language of the challenged statute precludes either the Board or a court from weighing the due process impact of such a threat.[16] These distinctions are critical.

Judgment for the plaintiff is entered in accordance with the attached order issued on February 1, 1977.

JOSEPH L. TAURO,
United States District Judge.

[16] The focus of this opinion is the impact of § 63. The court does not reach the question of whether a discretionary refusal by the Board under like circumstances would be unconstitutional.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1122.

ALEXANDER T. ARTHURS,
PLAINTIFF, APPELLEE,

v.

CHRIS O. STERN ET AL.,
DEFENDANTS, APPELLANTS.

Judgment.

Entered August 16, 1977.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed.

By the Court:

DANA H. GALLUP,
Clerk.

United States Court of Appeals for the First Circuit

No. 77-1122

ALEXANDER T. ARTHURS,
PLAINTIFF, APPELLEE,
v.
CHRIS O. STERN, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U. S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
CAFFREY,* *District Judge*.

S. Stephen Rosenfeld, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Steven A. Rusconi*, and *Garrick F. Cole*, Assistant Attorneys General, were on brief, for appellants.
David Berman for appellee.

August 16, 1977

COFFIN, *Chief Judge*. The plaintiff-appellee is a physician accused of writing illegal prescriptions. As a result of the charges, disciplinary proceedings were begun before the Board of Registration and Discipline in Medicine of the Commonwealth of Massachusetts. A criminal investigation was also begun, and indictments were handed down. When the disciplinary hearing began, the plaintiff requested that proceedings be continued until after dis-

* Of the District of Massachusetts, sitting by designation.

position of the criminal charges. The hearing officer refused, pointing to a state statute (§ 63) that forbids continuances of that sort.[1]

The plaintiff then brought this suit in federal district court. He pointed out that the disciplinary board would draw an adverse inference from his silence if he invoked his privilege against self-incrimination at the hearing. The threat of losing his license, he argued, would force him to testify, thus revealing his criminal defenses and making statements that might be used against him in the criminal trial. The district court, relying on the Fifth Amendment's privilege against self-incrimination and general notions of due process, enjoined the disciplinary board from using § 63 as a reason for refusing the plaintiff a continuance. The present appeal followed. After the appeal, but before this opinion issued, one set of criminal charges went to trial. Plaintiff testified at his trial and was acquitted. Other charges are pending, and the board has not attempted to go forward with its proceedings.

This case can be resolved on the merits[2] by reference to an adverse inference if a doctor refuses to testify at a disciplinary hearing. The board is not conducting a criminal trial, and civil proceedings are governed by a different set of Fifth Amendment principles. In civil cases, the state may not force incriminating testimony from a citizen by threatening penalties or automatic unfavorable judgments. *See, e.g., Lefkowitz* v. *Cunningham*, —— U.S. —— (June 13, 1977). But this principle does not control when the only consequence of silence is the danger that the trier of fact will treat silence as

[1] "Said boards shall not defer action upon any charge before them until the conviction of the person accused . . . ." Mass. Gen. Laws, ch. 112, § 63.

[2] On appeal, for the first time, the board urges several other grounds for reversal. We are reluctant to consider them at this late date. Because we reverse on the merits, we need not decide whether these belated arguments were properly before us.

evidence of guilt.[3] The distinction is drawn in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), which held that a prison disciplinary board may give weight to an accused inmate's silence when he stands mute for fear of a related criminal prosecution. The *Baxter* Court stated the principle broadly: the Fifth Amendment does not bar an adverse inference "where the privilege is claimed by a *party to a civil cause.*" *Id.* at 318. We think it applies as forcefully in medical discipline cases as it does in prison discipline cases. The appellee's assertion that doctors have a stronger liberty and property interest in continuing their practice than prisoners have in avoiding discipline is not very persuasive. Moreover, while such distinctions may have a place in a procedural or substantive due process case, they are not relevant to Fifth Amendment analysis. *Cf. Paul* v. *Davis,* 424 U.S. 693 (1976).

Nor is there anything inherently repugnant to due process in requiring the doctor to choose between giving testimony at the disciplinary hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of his license. The doctor's due process argument rests in part on the claim that the threat of an adverse inference unfairly forces him to reveal his criminal defense in advance of trial. He has some case support for his proposition. *Silver* v. *McCamy,* 221 F.2d 873 (D.C. Cir. 1955).[4] To the extent that this

[3] The Commonwealth has stated in its brief (p. 42) that "The Board's ultimate decision could not be based solely upon an adverse inference drawn from [the doctor's] presumed refusal to testify . . . [S]uch a determination would lack substantial evidence and be subject to sure invalidation upon judicial review."

[4] A related argument is that the threat of subsequent criminal proceedings unfairly forces him to remain silent and thus constitutes an unconstitutional restriction on the evidence the board accepts. *Cf. Bowman Trans., Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 288 n. 4 (1974). We see no merit in this claim. *See generally Flint* v. *Mullin,* 499 F.2d 100 (1st Cir. 1974). The cases on which appellee apparently relies on are inapposite; they deal with the limits of judicial notice and rest on notions of unfair surprise. *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292 (1937).

argument rests on the broad ground that parties with something to lose in a proceeding may never be forced to make this choice, it is answered by *United States* v. *Kordel,* 397 U.S. 1 (1970). In *Kordel,* the FDA began an in rem action against two products sold by a corporation whose officers were in serious danger of criminal prosecutions related to the products. The officers argued that it violated due process to hold the civil proceeding, with its attendant discovery, before the criminal trial. This the Court emphatically and unanimously denied:

> "The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11.[5]

The defendants in *Kordel* raised one hypothetical that disturbed the Court. Suppose, they argued, no officer could answer the civil interrogatories without incriminating himself. The Court responded that "[f]or present

[5] The *Kordel* Court found no particular facts requiring a different result in that case. Nor do we find such facts here. The disciplinary proceeding was not brought solely to obtain evidence for the criminal prosecution; the doctor was aware during the hearing of the pending criminal actions; the doctor had counsel; and the doctor does not claim a danger of adverse publicity or any other special circumstances. *See Kordel, supra,* 397 U.S. at 11-12.

purposes we may assume the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until after termination of the criminal action." *Id.* at 9.*

[*After this point, the court made numerous changes in its opinion to accompany its order of September 23, 1977. What follows is the opinion as finally worded on September 23, 1977. Immediately thereafter is printed the last paragraph of the opinion as it was worded on August 16, 1977.]

The doctor seizes on this cautiously tentative language, arguing that the Fifth Amendment may require the board to stay its proceedings until the criminal action ends. We disagree. Whatever suggestion that such an order is compelled might be read into this dictum would seem to be negated by the later decision in *Baxter v. Palmigiano, supra.* Indeed, the discussion in *Kordel* regarding protective orders is limited to the unique context in which corporate officers might be prevented from exercising their Fifth Amendment privilege because to do so would unacceptably extend the constitutional protection to the corporation which employed them. This is totally inapposite to the case before us. The remainder of the *Kordel* opinion is simply a recognition of the power of federal courts, after a balancing of interests in the particular case before them, to stay civil suits because of pending criminal charges. *See, e. g., Gordon* v. *FDIC,* 427 F.2d 578 (1968). The denial is reviewed simply for abuse of discretion. *See Iannelli v. Long,* 487 F.2d 317 (3d Cir. 1973); *General Dynamics Corp. v. Selb Mfg. Co.,* 481 F.2d 1204 (8th Cir. 1973). Given the strong public interest in promptly disciplining errant physicians taken as a class, we see no reason to hold that the board was or could be constitutionally required to stay its pro-

ceedings until the criminal prosecutions against any particular doctor were over.[6] *De Vita v. Sills,* 422 F.2d 1172 (3d Cir. 1970); *United States v. Sloan,* 388 F.Supp. 1062 (S.D.N.Y. 1975); *Keene v. Rodgers,* 316 F.Supp. 217, 221 n. 4 (D.Me. 1970).

Reversed.

*The district court took the view that § 63 impermissibly restricted the board's discretion to grant a continuance. We have concluded that the constitution does not require a stay in this case; we need not ask whether § 63 can be constitutionally applied in all cases. The statute is constitutional as applied, and we see no reason to create a variant of "overbreadth" analysis for cases of this sort.

The doctor seizes on this cautiously tentative language, arguing that the Fifth Amendment requires the board to stay its proceedings until the criminal action ends. We disagree. Whatever suggestion that such an order is compelled might be read into this dictum would seem to be negated by the later decision in *Baxter* v. *Palmigiano*, *supra*. Moreover, the statement seems more of a recognition of the power of federal courts, after a balancing of interests in the particular case before them, to stay civil suits because of pending criminal charges. *See*, *e.g.*, *Gordon* v. *FDIC*, 427 F.2d 578 (D.C. Cir. 1970). Frequently the request for a stay is denied. *See*, *e.g.*, *Gordon* v. *Miami National Bank*, 406 F.2d 660 (D.C. Cir. 1968). The denial is reviewed simply for abuse of discretion. *See Iannelli* v. *Long*, 487 F.2d 317 (3d Cir. 1973); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973). At least on the facts of this case,[6] given the strong public interest in promptly disciplining errant physicians, we see no reason to hold that the board was constitutionally required to stay its proceedings until the criminal prosecutions are over. *DeVita* v. *Sills*, 422 F.2d 1172 (3d Cir. 1970); *United States* v. *Sloan*, 388 F. Supp. 1062 (S.D. N.Y. 1975); *Keene* v. *Rodgers*, 316 F. Supp. 217, 221 n. 4 (D. Me. 1970).

Reversed.

[6]The district court took the view that § 63 impermissibly restricted the board's discretion to grant a continuance. We have concluded that the constitution does not require a stay in this case; we need not ask whether § 63 can be constitutionally applied in all cases. The statute is constitutional as applied, and we see no reason to create a variant of "overbreadth" analysis for cases of this sort.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1122

ALEXANDER T. ARTHURS,
PLAINTIFF, APPELLEE,

v.

CHRIS O. STERN, ET AL.,
DEFENDANTS, APPELLANTS.

Memorandum and Order.

Entered September 7, 1977.

The slip opinion in the above named case is amended as follows:

On page 2, ten lines from bottom, insert after the word "to" at the beginning of the line, the following:

"settled law. The board is not constitutionally forbidden from drawing . . . ."

By the Court,

DANA H. GALLUP,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1122

ALEXANDER T. ARTHURS,
PLAINTIFF, APPELLEE,

v.

CHRIS O. STERN ET AL.,
DEFENDANTS, APPELLANTS.

Before COFFIN, Chief Judge,
CAMPBELL, Circuit Judge,
CAFFREY*, District Judge.

Memorandum and Order.

Entered September 23, 1977.

Appellee's petition for rehearing questions the meaning of the last page of our slip opinion in this case, particularly the last sentence, which reads, "At least on the facts of this case, given the strong public interest in promptly disciplining errant physicians, we see no reason to hold that the board was constitutionally required to stay its proceedings until the criminal prosecutions are over." Petitioner argues that *United States* v. *Kordel*, 397 U.S. 1 (1970) leaves open the possibility that a professional board's civil hearing held before pending criminal

*Of the District of Massachusetts, sitting by designation.

charges are adjudicated could impair a defendant's privilege against self-incrimination; therefore, the defendant should have the opportunity to argue for a continuance before the board on these grounds. Petitioner therefore concludes that to the extent that Mass. Gen. Laws, ch. 112, § 63 prevents him from exercising such an opportunity in any meaningful fashion, it is unconstitutional. Moreover, to the extent that our opinion indicates that we have concluded that petitioner's constitutional rights would not be impaired by a civil hearing prior to the adjudication of criminal charges against him, petitioner claims that we have erroneously decided the merits of petitioner's claim that a continuance should have been granted as opposed to his right to argue for a continuance before the board.

We believe that petitioner has misconstrued his constitutional rights under *Kordel* and our opinion. However, recognizing that our opinion as originally written does contain some ambiguity we order the following amendment to the text. The final paragraph of page 5 should now read as follows (the underlined text indicating new additions and the bracketed text indicating deletions):

> The doctor seizes on this cautiously tentative language, arguing that the Fifth Amendment *may* require[s] the board to stay its proceedings until the criminal action ends. We disagree. Whatever suggestion that such an order is compelled might be read into this dictum would seem to be negated by the later decision in *Baxter* v. *Palmigiano, supra. Indeed, the discussion in Kordel regarding protected orders is limited to the unique context in which corporate officers might be prevented from exercising their Fifth Amendment privilege because to do so would unacceptably extend the constitutional protection to the corporation which employed them. This is totally inapposite to the case before us. The remainder of*

the Kordel opinion is simply a recognition of the power of federal courts, after a balancing of interests in the particular case before them, to stay civil suits because of pending criminal charges. *See, e.g., Gordon* v. *FDIC*, 427 F.2d 578 (D.C. Cir. 1968). The denial is reviewed simply for abuse of discretion. *See Inannelli* v. *Long*, 487 F.2d 317 (3d Cir. 1973); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973). [At least on the facts of this case,[6]] Given the strong public interest in promptly disciplining errant physicians *taken as a class*, we see no reason to hold that the board was or could be constitutionally required to stay its proceedings until the criminal prosecutions *against any particular doctor were* [are] over.[6] *DeVita* v. *Sills*, 422 F.2d 1172 (3d Cir. 1970); *United States* v. *Sloan*, 388 F. Supp. 1062 (S.D. N.Y. 1975); *Keene* v. *Rodgers*, 316 F. Supp. 217, 221 n. 4 (D. Me. 1970).

The petition for rehearing is denied.

By the Court:

DANA H. GALLUP, *Clerk.*
By FRANCIS P. SCIGLIANO,
Chief Deputy Clerk.